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BOOK REVIEW

Enlightening Identity and Copyright

SHUBHA GHOSH†

I. IN WHICH THE AUTHOR ADDRESSES HIMSELF TO A NEW BOOK AND OLD IDEAS

The Enlightenment, defined by the *Oxford English Dictionary* as “the 18th c. philosophy emphasizing reason and individualism over tradition,”¹ is often referred to as the Age of Reason. Challenging this description of the Enlightenment is Professor Emma Rothschild’s new book, *Economic Sentiments*,² an in-depth and fresh discussion of the thought of Adam Smith and Condorcet. Sentiments, uncertainty, and concern for equality were, according to Professor Rothschild, as much a concern for Smith and Condorcet as order and reason. While much of what Professor Rothschild says is not new, she presents Enlightenment thought as offering possibilities for current debates in copyright and identity politics.

Professor Rothschild’s book comes in a recent line of academic and popular works that reframe the Enlightenment. A new biography of Kant,³ several books

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1. 5 OXFORD ENGLISH DICTIONARY 268 (2d ed. 1989).

2. EMMA ROTHSCHILD, *ECONOMIC SENTIMENTS* (2001).

3. MANFRED KUEHN, *KANT: A BIOGRAPHY* (2001).

representing the thought of the Founding Fathers,⁴ and a remarkable fictional retelling of the conflict leading to the drawing of the Mason-Dixon line⁵ are just a small part of the growing canon on the Enlightenment to which *Economic Sentiments* contributes. But Professor Rothschild's book stands out in two ways. First, she has made a useful contribution to the history of economic ideas, synthesizing familiar materials and presenting them in a new light. Second, she offers valuable insight into the thought of two seminal Enlightenment figures: Adam Smith, often thought of as the father of modern economics, and Condorcet, the originator of a quantitative analysis of politics.

Even if Professor Rothschild's book is part of a larger trend to revisit the Enlightenment and remap its contours, why should anyone concerned with law or with jurisprudence care? After all, ideas have progressed since the Enlightenment in ways that many Enlightenment thinkers could not imagine. A concern with Enlightenment thought may seem to some as infantile nostalgia—a search for origins that distracts from more immediate problems. But as Professor Rothschild points out, the twenty-first century has much in common with the world inhabited by Smith and Condorcet. “The political and economic thought of the late eighteenth century,” Professor Rothschild contends, “the old, lost idyll of universal freedom—is itself, now, newly familiar.”⁶

What the late eighteenth and incipient twenty-first centuries have in common is a “sense of an unbounded future.”⁷ “Political institutions are more free of the fear of revolution now than at any time in the nineteenth or twentieth centuries. The rhetoric of the endlessness of commerce is more unquestioned.”⁸ But despite this optimism, citizens of the twenty-first century are concerned with “the endless uncertainty, the unquiet imagination, which were believed, in the late eighteenth century, to be

4. *E.g.*, JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* (2000); DAVID McCULLOUGH, *JOHN ADAMS* (2001); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1997).

5. THOMAS PYNCHON, *MASON & DIXON* (1997).

6. ROTHSCHILD, *supra* note 2, at 6 (2001).

7. *See id.*

8. *Id.*

the consequences of commercial freedom.”⁹ Consequently, according to Professor Rothschild, understanding late eighteenth century thought can aid in understanding our present context.¹⁰

To illustrate Professor Rothschild’s points about the parallels between the eighteenth and twenty-first centuries, I provide two examples drawn from ongoing debates among legal academics. My contention is that rethinking and engaging the Enlightenment can aid in each of these debates.

The first debate focuses on “romantic authorship” among scholars of copyright law. Copyright law is premised on the assumption of the “romantic author”—the lone genius that creates valuable expression. Many scholars have criticized this assumption without providing a substitute. A substitute may be found in how Enlightenment thinkers viewed labor and social relations.

The second is the ongoing debate between scholars of law and economics and scholars of a more humanistic persuasion, particularly those engaged in what I refer to very broadly as “identity studies.” With respect to the debates percolating from “identity studies,” the central premise is one of the centrality of individual identity within a group and the irreconcilability of passion and reason. Seeing how Enlightenment thinkers attempted to reconcile these issues may enliven and enrich the debate. I do not believe that Enlightenment thought offers solutions; I do think, with Professor Rothschild, that casting attention on debates from the eighteenth century can aid in our understanding of the twenty-first.

While I ultimately conclude that Professor Rothschild’s book does not offer satisfying solutions, her book is an admirable start for future research. Put another way, in this review, I not only offer some glimpse into the book *Economic Sentiments*, I also play “Monday morning quarterback” (or “Monday morning auteur”) and describe the hypothetical book that I wish had been written. But before I present the book as I wish it had been composed, let me attempt to do justice to Professor Rothschild’s accomplishment by condensing many of her key arguments and conclusions.

9. *Id.*

10. *Id.* at 5-6.

II. IN WHICH THE BOOK IS REPRESENTED AND, LET'S PRAY, NOT DISTORTED

Professor Rothschild guides the reader through the intricacies of Smith and Condorcet's writings and their interplay with contemporary debates. Although the book does not provide a thorough account of either author, *Economic Sentiments* does demonstrate what the two authors shared, and their shared elements serve as a foundation for Rothschild's reconstruction of Enlightenment thought. The views of Smith and Condorcet on contemporary policy debates illustrate their common bond and the depth of their thought on issues of individual rights, markets, and distributive justice.

A. Highlighting Four Common Themes

Adam Smith is thought of as the father of modern economics. His book *The Wealth of Nations*¹¹ provided a detailed account of certain aspects of the English economy and marked a separation of economics from moral philosophy. In his equally famous *The Theory of Moral Sentiments*,¹² Smith developed an analysis of emotions that was simultaneously unsentimental and cognizant of the force of emotions in human life.

Condorcet did for politics what Smith did for economics. His *Esquisse d'un Tableau Historique des Progres de L'Esprit Humain*¹³ is a treatise on contemporary laws and politics that is remembered largely for its discussion of the deficiencies of voting mechanisms. The Condorcet paradox, which demonstrates how majority voting can yield inconsistent outcomes, is often cited as a sobering illustration of the pitfalls of democracy and majoritarianism.¹⁴ Condorcet, himself, died as a victim of

11. ADAM SMITH, *THE WEALTH OF NATIONS* (R.H. Campbell et al. eds., 1976).

12. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie eds., 1976).

13. CONDORCET, *ESQUISSE D'UN TABLEAU HISTORIQUE DES PROGRES DE L'ESPRIT HUMAIN* (Yvon Belaval ed., 1970).

14. See, e.g., Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2129-30 (1990) (describing Condorcet paradox as a part of criticism of its implications for democratic politics); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1329-50 (1995) (using Condorcet paradox as analytical tool).

the Reign of Terror. Smith and Condorcet together represent the dominance of reason and analysis over emotions and intuition in understanding human affairs, economic and political.

Smith and Condorcet's ideas intersect on four points, according to Rothschild.¹⁵ Both believed that economic rights were coextensive with political rights. The liberal distinction between personal and civil liberties and economic rights, such as rights in property, would have been foreign to both thinkers, as well as Enlightenment thought more broadly. Just as the line between the political and economic was non-existent, so was the distinction between reasoned economic calculus and economic sentiments. The figure of *homo economicus* as a character devoid of passion and emotion would have seemed as empty and unintelligible to Smith and Condorcet as he does to many readers of law and economics today. Passion informed judgment and reason devoid of sentiment would have been seen as one-dimensional and misguided.

Both Smith and Condorcet, however, also recognized that passion could distort reason. The word that Rothschild appeals to many times is "vexation"¹⁶—the destructive uses of passion to subvert order and to oppress others. The curative for the vexatious use of the sentiments, according to both Smith and Condorcet, is the creation of public institutions, which serve to educate and enlighten all citizens. Universal education was the key to restore the balance between economic reason and economic sentiment. But unlike many twentieth century thinkers, Smith and Condorcet did not view the creation of public institutions as a panacea. Both were aware of the limits of reason and the role uncertainty played in subverting man's plan. The universe of both Condorcet and Smith "is a place of uncertainty and irresolution,"¹⁷ rooted in the diversity of human beings and the battle within each individual among countless passions and interests.

Such is Rothschild's portrait of the Enlightenment as reflected in the thought of Smith and Condorcet. The tandem of economics and politics, the interplay of emotions

15. See ROTHSCHILD, *supra* note 2, at 218-28.

16. The word is used so often by Rothschild that it has its own index entry, with references to *id.* at 27-28, 33, 110-11, 165, 169, 262 n.100.

17. *Id.* at 228.

and reason, the threat of vexation and the cure of public education, and the underlying uncertainty and irresolution are the four shared themes in the works of Smith and Condorcet.

This portrait should not be surprising. It is a portrait captured in Peter Gay's three-volume account of the Enlightenment¹⁸ and painted by Voltaire in his *Candide*, a satire of rationalism and optimism that debunks the "best of all possible worlds."¹⁹ Many Enlightenment thinkers were reacting to the political and intellectual despotism of monarchy and church. The goal of being enlightened was to cast light on the folly of deductive rationalism and metaphysics that shadowed the realities of the world and of society. When Voltaire ends *Candide* with the maxim about cultivating one's garden,²⁰ he would be in sympathy with the Enlightenment canvas populated by Rothschild's reading of Smith and Condorcet: the world is one full of diverse reasons and passions in which the waves of uncertainty and unpredictability are broken by public institutions as fragile as the humans who made them.

Fragility, I think is the key word for Rothschild, especially as she parallels the movement towards universal commerce in the eighteenth century with today's trajectory. What can be gleaned from Smith and Condorcet for twenty-first century thinkers, politicians, lawyers, and policy makers who stand in the wake of Capitalism's triumph? Despite Smith and Condorcet's appeal to political conservatives who find support in Smith for the triumph of the "invisible hand" of the marketplace and in Condorcet for the malleability and irrationality of political decision making, their thought reveals two sides to the Enlightenment, a "good Enlightenment" and a "bad Enlightenment."²¹ The "good Enlightenment" is one "in which commerce and liberty are interrelated in the sentiments and opinions of individuals."²² In the "bad Enlightenment," "individuals are imprisoned by their own discontent, or by their own cupidity, in a society of

18. See, e.g., PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION*, VOLUME II: *THE SCIENCE OF FREEDOM* (1969).

19. VOLTAIRE, *CANDIDE* 2, 118 (photo. reprint 1999) (1759).

20. *Id.* at 149.

21. ROTHSCHILD, *supra* note 2, at 250.

22. *Id.*

universal commerce.”²³ The uncertainty of human passions and reason creates the fragility by which the “good Enlightenment” can degenerate into the bad. Conservative thinkers that see in the Enlightenment only the possibility of the good are just as guilty of the unbounded optimism of the deductive rationalists against whom many Enlightenment thinkers were reacting.

But if all that Smith and Condorcet have to offer is the idea that the world is uncertain and fragile—that we live in a “fatherless world,”²⁴ to use Professor Rothschild’s phrase—then what is the constructive use of their thought? The two thinkers’ contributions to the eighteenth century political debates over famine relief and apprenticeship illustrate the pragmatic and instrumental dimensions of their work. Even more illuminating is Adam Smith’s conception of the “invisible hand,” a favorite idea of political conservatives in advocating unfettered markets. Smith’s view of the “invisible hand,” as Rothschild aptly demonstrates, was much more ironic and illustrates more cogently what Rothschild sees as the virtues of the “good Enlightenment.”

B. Engaging and Enlightening Policy Debates

In three well-researched chapters, Professor Rothschild documents the views of Smith and Condorcet on famine relief and Smith’s views on apprenticeships and the invisible hand.²⁵ Each chapter enhances our appreciation for the depth of the two authors’ writings and what Professor Rothschild would describe as the “good Enlightenment.”

First of all, Smith and Condorcet were opposed to government regulation of the corn (or in the United States, wheat) market. Their views, however, should be distinguished from what we currently take as standard “laissez-faire” positions. As Professor Rothschild emphasizes, Smith “favored complete freedom in one market, for corn” and “his support for free commerce in corn was quite consistent with support of intervention in

23. *Id.*

24. *Id.* at 218.

25. See *id.* at 72-86 (ch. 3, Commerce and the State), 87-115 (ch. 4, Apprenticeship and Insecurity), 116-56 (ch. 5, The Bloody and Invisible Hand).

markets for labor, land rental, and public works.”²⁶ Condorcet’s view was identical with Smith’s on the issue of free markets for corn. According to Condorcet, “[g]overnment owes relief to those who suffer . . . [by] assuring a salary and work to the poor.”²⁷ Furthermore, neither advocated an unregulated market for corn because of an *a priori* faith in markets or fear of government. The unregulated market for corn, accompanied by regulated markets for labor, land rental, and public works, would serve to avoid famines and the spread of misery among the poor.

What distinguishes Smith and Condorcet’s criticisms of government regulation from analogous criticisms today (such as of rent control or of the minimum wage) is attention to institutional detail and the possibility of disequilibrium in markets. Both Smith and Condorcet understood the interactions among various markets and the way in which institutions, such as the government, guilds or town councils, shaped and modulated the operations of markets. Their vision was neither an anarchical nor a utopian one. Markets worked because of institutions and they often failed because of institutions, a position far removed from the standard neo-classical economic view of markets as frictionless mechanisms for the voicing of preferences and the earning of profits. Government intervention could matter in more than a detrimental way. Governments could create markets or cure them. Bad policy arose from intervention in the wrong market through improper means.

The care for institutional detail and concern with disequilibrium are also reflected in Smith’s analysis of the apprentice and guild system, a method for structuring labor markets and mobility that Smith absolutely detested. With his analysis of the apprentice system, Smith turns to private regulation, as opposed to government regulation. Smith’s suspicion of private cartels is well documented by his oft quoted sentence: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in

26. *Id.* at 82-83.

27. *Id.* at 78.

some contrivance to raise prices.”²⁸ Guilds posed problems very similar to the secret cabals and conspiracy that Smith condemned. They imposed barriers on social mobility and entry into occupations and permitted the play of vexation and passions as opposed to merit and talent. Many of Smith’s arguments are, of course, reminiscent of conservative criticisms of modern labor unions and government interventions in the marketplace. But Smith was no proto-Lochnerian. He was in no way extolling an early version of “freedom of contract.” As is made clear from Professor Rothschild’s discussion of the debate over the corn laws, Smith did value government intervention and did see properly targeted government policy as necessary to prevent the scourge of famines. Similarly, the elimination of the guild system was necessary not to permit the supremacy of contract but to promote a more equitable distribution of income. Smith’s concerns were with equity and income distribution, a point overlooked by those who take out of context his criticisms of market regulation and government intervention.

The dissonance between Smith’s writings and how he is remembered is most striking in Professor Rothschild’s account of the “invisible hand,” Smith’s most famous and most often cited idea. Smith used the term “invisible hand” three times in his writing: once in a *History of Astronomy*,²⁹ published posthumously, once in his *Theory of Moral Sentiments*,³⁰ published in 1759, and once in his *Wealth of Nations*,³¹ published in 1776. In each instance, Professor Rothschild concludes, Smith was being ironic and sardonic. In his *History of Astronomy*, for example, Smith was making fun of the faith of members of primitive society in the forces of nature which are attributed to the invisible hand of gods and demons. In the *Theory of Moral Sentiments*, Smith uses the phrase in describing “unpleasant rich proprietors” who have no concern for justice or humanity but pursue “their own vain and insatiable desires” in employing and paying poor workers “to produce luxurious commodities” and thus “are led by an

28. This famous statement from *The Wealth of Nations* is quoted and commented upon in GAY, *supra* note 18, at 366.

29. Adam Smith, *History of Astronomy*, in ESSAYS ON PHILOSOPHICAL SUBJECTS 49-50 (W.P.D. Wrightman et al. eds., 1980).

30. SMITH, *supra* note 12, at 184-85.

31. SMITH, *supra* note 11, at 453, 456, 462, 471.

invisible hand to . . . without intending it, without knowing it, advance the interest of the society."³² Finally, in *The Wealth of Nations*, the invisible hand metaphor is used to promote free international trade and challenge the tenets of mercantilism.

The three uses of the invisible hand metaphor, according to Rothschild, have been seen as illustrating an evolution of Smith's thought on the benefits and grace of free trade and unregulated commerce.³³ However, as Rothschild points out, Smith made reference to the invisible hand so sporadically and so ironically, it is not conceivable that he advocated the faith in market systems and unfettered freedom that many conservative thinkers would like to believe. Instead, the invisible hand metaphor should be understood in light of Smith's stoicism and belief in natural religion, derived from the writings of David Hume. What Smith did believe in was the underlying disorder of the cosmos and the vagaries of individual human reason and passion. Faith in the invisible hand, in the tendency towards spontaneous order, was, for Smith, as naive and as unsophisticated as the belief in the invisible hand of gods and demons to cause floods and plagues. Order is not spontaneous but can be, as in the free trade example, the unintended consequence of individual self-interested action. The response to a chaotic world is not faith in spontaneous order but in the ability of individuals to temper their passions and to avoid oppressive and vexatious conduct. The invisible hand is irony, when seen against the visible actions of even-tempered individuals.

Professor Rothschild's exegesis of Smith's view of the invisible hand is the most controversial portion of the book. A review in the *Wall Street Journal* contends that we have come a long way from Adam Smith; and even if Adam Smith may not have whole-heartedly believed in the invisible hand and the attendant notion of freedom of contract, the two hundred or so years of experience with market economies, socialist systems, and government regulation support a more libertarian reading of Smith's words.³⁴ Such a conscious politicization of Smith, however,

32. ROTHSCHILD, *supra* note 2, at 116-17.

33. *See id.* at 155-56.

34. Jerry Z. Muller, *Great Minds, Imperfect Markets*, WALL ST. J., June 21, 2001, at A16.

does not address Rothschild's more compelling point. Smith was a Stoic, not a Republican or "blue dog Democrat." His conservatism reflected not only a doubt in the existence of an underlying order to the universe but also a belief in the ability of reason and even-temperedness to exorcise the demons posed by the passions. Smith's stoicism, not an inherent appeal to principle such as freedom of contract, informed his view of policy and political-economy.

A more technical criticism of Professor Rothschild's discussion of the invisible hand can be based on developments in economic theory since Smith. Mathematical models, having roots in the simple supply and demand models made popular by Alfred Marshall, serve as tools to control and predict the direction of the marketplace.³⁵ The biggest development in economic theory in the twentieth century has been the creation of a complete and consistent model of market economies that would describe how markets function. The construction of such a model would either support socialist-style planning or serve as a tool to understand the role of government policy and the fluidity of market mechanisms. Such a model, called the general equilibrium model, was developed in the 1950s by Kenneth Arrow, Frank Hahn, and Gerard Debreu.³⁶ The general equilibrium model, and the two welfare theorems that are derived from the model, serve as the basis for modern understandings of Smith's invisible hand.³⁷

Professor Rothschild briefly mentions Professors Arrow and Hahn's description of Smith's idea of the invisible hand as "poetic."³⁸ But for modern economic theory, the invisible hand is not mere rhetoric. The general equilibrium model allows economists to demonstrate that under certain conditions market mechanisms can function smoothly and consistently, without the intervention of a visible agent such as the government or private cartels. Under similar conditions, market mechanisms can guarantee efficient results, known as the First Welfare Theorem; and under additional conditions, any distributional outcome can be reached through a market mechanism supported by the appropriate distribution of initial resources, a result known

35. See MARK BLAUG, *ECONOMIC THEORY IN RETROSPECT* 327-427 (1962).

36. See *id.* at 574-614.

37. See *id.* at 599-600.

38. ROTHSCHILD, *supra* note 2, at 122.

as the Second Welfare Theorem.³⁹ The invisible hand rests on technical, mathematical assumptions about the structure of technology and individual preferences and choice behavior. Furthermore, the visible hand of the government, working through the redistribution of initial resources, can aid in reaching any desired distributional outcome by appropriate manipulation of markets. Whether Rothschild is correct or not about Smith's true posture towards the invisible hand, modern economic theory provides a complete and consistent rendering of the invisible hand and the power of the market mechanism.

Even if economic theory belies Smith's actual position, the contrast between how modern economic theory has viewed markets and how Smith viewed them is striking. Highlighting this contrast is Rothschild's strongest contribution, not only in her chapter on the invisible hand, but also in her discussion of the corn laws and guilds. The major contrast arises in differences in ends. General equilibrium theory is concerned with establishing the efficiency of markets. As has been emphasized, Smith was primarily concerned with questions of equity and distribution as well as the orderly functioning of markets. Although general equilibrium theory can be used to analyze issues of equity and distribution, questions of equity are often placed outside the theory, as the domain of non-economic fields. For Smith, as for Condorcet, questions of efficiency and equity could not be separated. Means and ends were intertwined as were the fields of politics and economics.

The more subtle contrast between modern general equilibrium theory and the thought of Smith (as well as of Condorcet) is the role of institutions.⁴⁰ Rothschild's chapters on the corn laws and guilds illustrate how sensitive Smith and Condorcet were to the institutional context of markets.

39. See DONALD E. CAMPBELL, *RESOURCE ALLOCATION MECHANISMS* 42-47 (1987).

40. See R.H. COASE, *The Institutional Structure of Production*, in *ESSAYS ON ECONOMICS AND ECONOMISTS* 3-14 (1994) (discussing the institutional dimensions of markets); see also Richard Posner, *Nobel Laureate: Ronald Coase and Methodology*, 7 J. ECON. PERSP. 195, 206 (1993) (In discussing current methodological debates in economics, Posner noted that, "for [Coase], the value of Smith's 'invisible hand' is that it directs our attention to visible phenomena, namely economic practices and institutions that can be observed, described, compared.").

Markets are not spontaneous creations; the creation of markets was a problem of institutional design and planning. The technical precision of general equilibrium theory makes it difficult to understand outside of equilibrium behavior. Questions of historical transition and development are impossible to analyze within general equilibrium theory and as a result are often dismissed as uninteresting because unanswerable. Smith and, even more so, Condorcet were attuned to disequilibrium behavior and the subtle interactions across markets as they responded to policy and changes in the social and political environment. For twenty-first century economists and law and economics scholars who are more institution-minded than efficiency-minded, a return to the roots of Smith and Condorcet provides an antidote to the limitations of general equilibrium theory, whose influence on contemporary policy making and law has been profound, even if invisible.

There is a story, perhaps apocryphal, among economists about Paul Samuelson and Milton Friedman, two renowned economists—Samuelson representing the liberal end of the spectrum and Friedman the conservative end. At a conference, after Professor Friedman presented a paper highly critical of government policies that intervened and upset the natural order and balance of the marketplace, Professor Samuelson commented, “Milton, I wish I were as certain of anything as you are of everything.” Samuelson’s view, at one level, is the one more consistent with the supposedly conservative Smith and Condorcet, at least as Rothschild presents them. For Smith and Condorcet, the world was an uncertain place, a “fatherless world.” As a result, both were very subtle and tempered in their judgments, closely analyzing the world as it is without resort to some rational, universal model. Ironically, their method contrasts sharply with that of Professor Samuelson, the pioneer in mathematical models of the marketplace. Smith and Condorcet were, first of all, empiricists—skeptical in judgments, suspicious of principle. Is it possible to find such a balance today? Professor Rothschild’s hope is that such a combination of cautious method and concern with distribution is possible in today’s world—one that, like Smith and Condorcet’s universe, is threatened by universal commerce and the “bad Enlightenment.”

C. Discerning the Enlightenment at the End of the Tunnel?

At the simplest level, the lesson to be drawn from Professor Rothschild's book is that the current claim by political conservatives that Smith and Condorcet are one of their own is incorrect. Her dissection of Smith and Condorcet's thoughts is meant to illustrate the disjunction between modern ideas and Enlightenment ideas about the marketplace and regulation. In fact, this simple point is made clear at the outset: the second chapter of the book is entitled "Smith and Conservative Economics" and demonstrates how both richer and subtler Adam Smith is than most conservatives would admit.

But if Smith and Condorcet do not clearly belong to the conservatives, should liberals or leftists stake a claim to their work? Or are Smith and Condorcet simply irrelevant to any current debate? These are the questions that Professor Rothschild leaves unanswered. After all, for those of us interested in the power of law to create institutions that promote democracy, equality, and access, there are more compelling thinkers than Smith and Condorcet to cite and espouse.

I wish Professor Rothschild had addressed these questions. Instead, she provides a juxtaposition of a good Enlightenment and a bad Enlightenment, concluding with an admonition against the latter and an endorsement of the former. Her concern is with the dangers of universal commerce, but she ignores the current debate over commodification that has been enriched by feminist legal theorists such as Margaret Jane Radin.⁴¹ There is no discussion of the *doux commerce* thesis (except for a passing reference)⁴² and its implications for globalization—issues resuscitated by Professor Jerome Reichmann in his work discussing TRIPS.⁴³ There is a missing half to Professor Rothschild's book. Perhaps she will write it. Perhaps someone else will.

41. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

42. ROTHSCHILD, *supra* note 2, at 37 (referring to Albert O. Hirschman, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (1977)).

43. Jerome H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, in *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION FOR THE KNOWLEDGE SOCIETY* 23-54 (Rochelle Cooper et al. eds., 2001).

What I propose in the remainder of this review is possible content for such a book. Such “Monday morning quarterbacking” may seem inappropriate and disrespectful. I mean no disrespect. Quite the contrary, I simply would like to explore for the patient reader the possibilities of Professor Rothschild’s stimulating ideas and the broader reasons to entertain and reconsider Enlightenment thought. I turn then to two current debates—one over romantic authorship, the other over identity politics—to crystallize these possibilities.

III. IN WHICH THE READER IS SHOWN A POSSIBLE ALTERNATIVE TO ROMANTIC NOTIONS OF AUTHORSHIP AND IDENTITY

Despite the parallels Rothschild draws between the eighteenth and twenty-first centuries, our world would look alien to Smith and Condorcet. Certainly they would recognize the issues raised by the expansion of markets and universal commerce, but they would also certainly be surprised by the pervasive values of diversity, pluralism, and tolerance of individual differences that has taken hold since (and perhaps despite) the Enlightenment. Smith and Condorcet would recognize the various arguments about individual freedom versus social and state regulation, but they may be taken aback at how the discussion of rights has expanded and at the enlarged domain of rights now recognizing non-whites and non-males as persons capable of having protected rights. Over two hundred years of history created a chasm between our world and the one that Professor Rothschild explores.

But Enlightenment thought is still of value and should not be simply archived and forgotten. Voices critical of legal doctrine and theory are often reacting to the errors created by counter-Enlightenment ideas, ones antithetical to the skepticism and tentativeness illustrated by Smith and Condorcet. In this section, I will illustrate this point and the potential value of rethinking the Enlightenment with reference to two debates: the first concerning “romantic authorship” in copyright law and the second over identity politics.

A. Making Light of Romantic Authorship

Copyright law regulates the production, publication, and distribution of expressive works, from novels to films, from software to architectural works. Modern copyright law has its roots in the Statute of Anne, enacted by Parliament in 1709.⁴⁴ The statute was a major challenge to the power of stationer's guilds, who traditionally had obtained the grant to control publication of literary works from the monarch. By shifting ownership and control to the authors of literary works, the Statute of Anne established the notion that authors have rights to control their creative works and are not subject to the dictate of publishers.

The protection of authors also informs United States copyright law. Congress has the exclusive authority under the Constitution to secure the rights of authors in their writings.⁴⁵ There have been several copyright statutes in U.S. history, going back to copyright acts passed by various colonies. The current act, the Copyright Act of 1976,⁴⁶ grants certain exclusive rights to the authors of original works of expression fixed in a tangible medium. These exclusive rights are limited principally by the doctrine of fair use, a statutory provision that permits through judicially administered standards such uses as photocopying for educational purposes, parodies, and criticism.⁴⁷ Current copyright law through fair use serves to balance private, authorial rights and public uses.

Two controversies currently the subject of copyright law illustrate the notion of romantic authorship. The first has to do with originality; the second with fair use in digital media. Copyright law protects original works of authorship, but the term "original" is not defined statutorily. Judicial glosses on the word are based on the idea of romantic authorship. Courts have repeatedly stated that they are not in the business of making aesthetic judgments about the merits of a work. "Original" does not mean that a work is especially meritorious or high-brow or unique. Advertisement and pornography are accorded as much copyright protection as sculptures and the Great American

44. See 9 THE STATUTES OF THE REALM 256 (1963).

45. See U.S. CONST. art. I, §8, cl. 8.

46. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101 et seq.).

47. See 17 U.S.C. §107 (1994).

Novel. The word "originality" simply means that the person who is claiming copyright in a work either created the work or obtained the copyright through assignment or transfer from the person who created the work. Originality is used in the sense of "originated," and works of expression originate from some human creator, regardless of the merits of the expression.

The problem for courts is that not all works can obtain copyright protection. Some things are so trivial that they would seem to be outside the scope of copyright protection. A list of what Salinger intends to buy at the grocery store is a work of expression, but it seems odd to accord it the same protection as *Frannie and Zooey*.⁴⁸ Or to take a more salient example, can I obtain a copyright in the Mona Lisa, a work that no one can claim a copyright in because it is in the public domain, by simply copying it in every detail on a canvas? My actions are a form of expression and my work, albeit a copy, is a work of expression created by me. But it seems strange for me to create a copyright in this way.⁴⁹

A final example, illustrating the commercial dimension of copyright, exemplifies another dimension of the problem. Suppose I form a business whose purpose is to produce and distribute data bases, lists of names and addresses and trivia that I painstakingly collect and organize. Do I have a copyright in these databases or are my works simply elaborate lists no different from Salinger's grocery list?

The Supreme Court, in a seminal decision from the early nineties, ruled that not all works of expression are equal.⁵⁰ Original did not simply mean that the work originated or was created by someone. Instead, original also had to mean creative in order to avoid extending copyright protection to everything created under the sun, no matter how trivial. The question of whether a work was creative enough to be original was not an aesthetic judgment. Instead, creativity was a question of the kind of effort that the author put into his expressions. A mere listing of data is not adequately creative for copyright protection. Neither is

48. Even though Salinger's shopping list has not been found to be copyrightable, his unpublished letters are copyright-protected. See *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987).

49. For a case where photographic copies of public domain artwork captured on a CD-ROM were found not to be copyrightable, see *Bridgeman Art Library Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

50. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

mere copying. Both are the result of "sweat of the brow," and mere sweat is not enough to establish creativity and gain copyright protection. Copyright protection is accorded to the products of "intellectual production," to borrow a phrase from an 1884 U.S. Supreme Court case holding that the photographs of Oscar Wilde were copyrightable.⁵¹ The product of mere physical efforts or mechanical reproduction cannot be copyrighted.

As many scholars have pointed out, the Supreme Court's ruling on originality in the *Feist* decision illustrates an acceptance of the idea of the romantic author.⁵² Works of expression are the products of creative genius, and copyright protection is needed to secure the rights of works of genius. The need for protection is often phrased in pecuniary terms, but even if the desire for profits does not motivate geniuses, copyright protection is needed to preserve the integrity of authors and their efforts. Works that are not the product of the romantic author do not require copyright protection. The corollary to the proposition that copyright protection serves to protect the romantic author is that the romantic author should have control over her works, with some limitations for fair use. In copyright law, the romantic author is linked with the creative entrepreneur. Both are individualistic, both are engaged in more than physical labor in order to innovate and bring new products to the world, and both are accorded strong rights in their creations through copyright law.

The link between the romantic author and the industrious entrepreneur has important implications for fair use, especially with the development of digital media, which permits the creation and dissemination of works of expression instantaneously. More troubling for copyright law is the ability to use digital media to unbundle and reshape existing creative works. Musical compositions

51. See *Borrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

52. See MARK ROSE, *AUTHORS AND OWNERS* 128, 135 (1993) (describing the use of personality as a basis for property protection under copyright); see also JAMES BOYLE, *SHAMANS, SOFTWARE, & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 41, 51, 159-161 (1996) (discussing the history of the concept of authorship and its relationship to the construction of self-interest); ROSEMARY COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 211-12, 219-20 (1998) (discussing romantic authorship); Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997).

through digitization can be sampled and rearranged. Songs bundled in compact disks can be unbundled and consumed individually. The power of digitization affects not only music, but also literary expression, photographs, and visual media. Creation is a process of taking bits and pieces of works and reconstructing them. Digitization makes this possible and also makes us realize that perhaps creation has always been a process of borrowing and reworking.

The figure of the romantic author can be a hindrance to the democratic push of digital media. If the romantic author through copyright law is given nearly absolute control over her work, then users of digital media can be legally enjoined from the most productive uses of the media. This conflict is precisely at issue in many of the current cases, the most prominent one being the dispute over Napster, in which various owners of copyright in songs successfully challenged a mechanism for the digital download of music created by Shawn Fannin.⁵³ On the one hand, the case involved the conflict over business interests that were losing revenue because of the alternative distribution mechanism and consumer interest in the practice of music sharing, which had been occurring since the creation of the tape recorder and which was being magnified by the digital media. Framed this way it may be difficult to see why the interests of the romantic author should trump those of the consumer/user/reader, especially when the copyright owners are not creative geniuses but corporate entities such as recording companies. The dispute could also be framed as a clash between two romantic authors, the creators of music versus the creator of an ingenious, innovative system for distributing and sharing music. Is one less creative than the other? Is one less the example of intellectual labor and creative effort? Can one answer these questions within the theory of romantic authorship without resort to aesthetic or other judgments?

The shaping of copyright law around the idea of romantic authorship has been criticized as being both limiting and limited, limiting because of its adverse effect on practices such as music sharing, limited because of its narrow individualistic rendering of the creative process. Yet no one has adequately proposed an alternative foundation; much of the criticism has proposed doctrinal tinkering to

53. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

cure some of the negative policy implications of romantic authorship.⁵⁴ I propose that a reconsideration of some aspects of Enlightenment thought may be useful to create an alternative foundation. Since romantic authorship has its roots in Romantic thought, much of which was a reaction to the Enlightenment, perhaps the problems with the romantic authorship framework rest in the rejection of certain Enlightenment notions. But what is it about Enlightenment thought that could serve as kindling for the creative fires needed to purge the romantic author?

Very few Enlightenment thinkers addressed the question of copyright law. Adam Smith did include a brief passage in *The Wealth of Nations* on copyright and book publishing as an example of fixed costs.⁵⁵ Despite this lack of attention, the Enlightenment provides an alternative to the romantic authorship framework as a means of conceptualizing the parameters of copyright law. Enlightenment thought, with its focus on individual reason and passion, was very much concerned with society and the institutions in which individuals functioned. Romantic authorship, on the other hand, is anti-social in many ways, viewing the author as the genius who challenges social conventions and thereby ensures social progress. Copyright law, when seen through the lens of romantic authorship, is a means of protecting authorial personality by giving the author strong proprietary rights in her creative works. Ironically, the theory of romantic authorship leads copyright law to be a means of protecting entrepreneurial, market-oriented activities. The romantic author and the capitalist entrepreneur are flip sides of each other. It is through this twist that entities like the Recording Industry Association of America serve the role of protected author under copyright law even though their copyrights were obtained through contract rather than creative effort that is associated with romantic authorship. Providing a basis for

54. Mark Lemley criticizes the romantic authorship model for not paying adequate attention to the economic issues raised by intellectual property. By appealing to economics, he proposes one possible alternative to the romantic authorship approach. However, given the connection between romantic authorship and the construction of self-interest, as discussed by Boyle, an appeal to economic theory, especially neo-classical theory, may not be an alternative to the theory of romantic authorship. See Lemley, *supra* note 52, at 882-83; BOYLE, *supra* note 52, at 159.

55. SMITH, *supra* note 11, at 754.

copyright law in Enlightenment, as opposed to Romantic, thought can be a curative for some of the current criticisms of copyright law.

What would an Enlightenment-informed (dare I say, Enlightened?) copyright law look like? It would be a body of law that recognizes the social dimensions of creativity as a process of borrowing as opposed to a series of radical breaks from the past. The analysis of copyright law issues would be grounded less in questions of individual ownership and control and more on the institutional dimensions of ownership and control. The historical roots of copyright law in the Statute of Anne would gather more salience not as a symbol of the victory of the author, but as a means of challenging the political and market control granted to the stationer's guild and publishers. The Statute of Anne, as I am sure Smith and Condorcet would gladly note, undermined the vexatiousness of a guild and replaced a system of privilege with one of individual merit and labor. Smith and Condorcet, I contend, would have been equally suspicious of current protection accorded to the music industry under copyright law through the guise of rewarding the romantic author. Sensitivity to institutional detail and context, as opposed to protection of the individual, would be the hallmark of an Enlightenment-informed copyright law.

Current U.S. copyright law is viewed as a branch of property law that serves to protect the property rights of authors and creators. Ownership and control are its bulwarks. Furthermore, these property rights are viewed as nearly absolute and plenary. As Professor Rothschild points out, Enlightenment thinkers were aware of shifts in what constitutes property, especially in the unstable world of commerce: "The new world of commerce was insecure . . . because it was subject to frequent and other sudden changes in laws, regulations, and the jurisprudence of property."⁵⁶ Rothschild isolates four types of property that was emerging during the Eighteenth Century, as documented in part by Smith and Condorcet: property rights in land, property rights in industry, property rights in government taxes and expenditures, and the nascent idea of property rights in the fruits of one's labor (the last being of course the closest to our conception of copyright).

56. ROTHSCHILD, *supra* note 2, at 240.

None of these types of property were viewed as fixed or non-malleable. Each was subject to change with the winds of commerce. Rights were important, but tentative, in the Enlightenment world—a means more than an end. The goal was social and market exchange and the promotion of human activity. Such tentativeness and concern for social, as opposed to individual, values could be the most valuable contribution that Enlightenment thought could make to our current understandings of copyright law.

B. Casting Light on Economic Man, Literary Women, and Other Fragments of Identity

By identity studies, I mean, very loosely, feminist theory and critical race theory and all its variants, such as Lat-Crit, Asian American Studies, gender studies, etc. I am principally concerned with the following shared beliefs of these various schools: individual cultural, racial, ethnic, and gendered identity matters for the structure of legal institutions. The goal is to empower traditionally oppressed and subordinated group identities.

This issue seems quite distant from that of intellectual property, the other topic of this section. But as several authors have pointed out, there is a common problem running through both intellectual property and identity studies. Professor Madhavi Sunder described the connection succinctly as a parallel between IP (intellectual property) and IP (identity politics).⁵⁷ The parallel can be expressed in another way. Just as the current trend in intellectual property is to turn culture into property by making proprietary the various artifacts of culture, so a current trend in identity studies is to turn identity into an inalienable property right vested in members of a particular cultural, racial, ethnic or gendered group. Culture and identity through legal discourse are being privatized.

It perhaps seems bizarre for me to contend that somehow the Enlightenment can provide any support for identity studies. The hierarchical, expressly racist assumptions of many Enlightenment thinkers are the subject of attack within identity studies. These assumptions are well documented, and the reader is advised to look at

57. See Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER, RACE & JUST. 69 (2000).

Professor Emmanuel Chukwudi Eze's *Race and the Enlightenment*, an anthology of writings that illustrate the Eurocentric positions of David Hume, Immanuel Kant, and others.⁵⁸ Even though Enlightenment thought is often associated with universalism, the idea that we are all united as members of the human species, it is also clear that many Enlightenment thinkers had clear views on who counted as a member of the human species. Identity studies is not so much anti-universalist, as motivated by clarifying the racial, cultural, ethnic, and gender dimensions of human beings. The battle lines seem clear, and the Enlightenment is on the other side. How can Enlightenment thought inform identity studies?

The answer to this question rests on the parallel between intellectual property and identity politics drawn above. Copyright law, as currently structured in the United States, has become increasingly privatized and shaped by the idea of the "romantic author"—the heroic individual that transcends social convention and brings new creations into the world. Despite the on-the-surface communitarian leanings of identity studies, much of the ideas are informed by equally Romantic notions. Individual identity is often an expression of one's will, an affirmation of private association with a specific group. Identity politics is often a matter of individual associational rights—the corporate entity, although ostensibly communitarian, serving as an extension or agent for individuals. The affirmation of identity and association is a means of empowering the individual, to ensure that the non-white, non-male individual has as much power as the white, European male. Identity becomes as proprietary under the various guises of identity studies as culture does under copyright law (and as many would contend intellectual property law, more broadly).

Amartya Sen, the person to whom Professor Rothschild dedicates her book, addresses some of the difficulties with identity studies and identity politics in a recent essay in *The New Republic*.⁵⁹ Professor Sen does not deny that identity is important in understanding the shape and contours of social institutions and law. But he is also

58. RACE AND THE ENLIGHTENMENT: A READER 1-9 (Emmanuel Chukwudi Eze ed., 1997) [hereinafter RACE AND THE ENLIGHTENMENT].

59. Amartya Sen, *Other People*, NEW REPUBLIC, Dec. 18, 2000, at 23-30.

cautious about some of the negative implications of identity politics, especially the possibility of "confounding our relations with other people."⁶⁰ Identity can serve as a barrier to valuable interaction and exchange, and Professor Sen cites David Hume for "the importance of increased intercourse in expanding the reach of our sense of justice."⁶¹

According to Sen, three ideas are often ignored by identity politics: plural identities, identity choice, and issues beyond identity. The idea of plural identities illustrates the involvement of individuals in multiple groups and the conflicts that may arise from such multiple associations. Professor Sen's point is not that plural identities should be avoided, but they exist as an empirical fact and identity politics ignores them and attempts to supplant them with unilateral loyalties to one group. Plural identities are useful to the promotion of the type of intercourse that can expand notions of justice. The fact of plural identities also underscores the idea of identity choice. Practitioners of identity politics have portrayed identity as a matter of self-realization, as opposed to choice; identity is inherent in the person waiting to be discovered and secured. However, according to Sen, identity is a matter of choice, a decision of association that does not arise solely from the expression of will or the search for empowerment. When framed as a matter of choice, identity association is no different from other forms of association, such as belonging to a corporate body or espousing some social or political interest. As Professor Sen concludes, "It is essential to recognize not only that identities can be plural, and that the priorities we assign to our different identities are a matter for us to decide, but also that moral and political inclusion transcends the domain of identity."⁶²

Despite the views of Enlightenment thinkers on race and gender, the attitude of the Enlightenment can do much to strengthen the goals of identity studies. If, as Professor Rothschild repeatedly indicates, the central belief of the good Enlightenment was skepticism and doubt, then the same skeptical mind-set should be focused on claims of racial superiority and the proprietary notion of identity. Skepticism should also be applied to claims that identity

60. *Id.* at 27.

61. *See id.*

62. *Id.* at 30.

does not matter and that we live in a color-blind or gender-neutral world. Identity is not an absolute principle, and like authorship, it has a social dimension. The disturbing assumptions about race and gender held by many Enlightenment thinkers should not detract from their method, which can serve to enrich current discussions of identity.

The subtleties of the Enlightenment are illustrated by a debate over race between Imanuel Kant and Johann Gottfried Herder, documented by Professor Eze in his *Race and the Enlightenment*.⁶³

In reviewing Herder's book, *Ideas on the Philosophy of the History of Mankind*, Kant was critical of Herder's method that, according to Kant, assumed there was a truth to history waiting to be uncovered. Kant was also critical of Herder's cultural pluralism, and unlike Herder, believed that classification of individuals based on skin color was sound. Neither side to this debate may be compelling to current thinkers of identity issues: Kant espouses the superiority of European white males and Herder concludes that blacks Africans belonged in Africa. But the debate is worth noting as evidence of the diverse views of race that existed during the Enlightenment. Even more compelling is the confusion and the uncertainty that the power of skepticism and reason brought to understanding cultural diversity. The "fatherless world," as described by Professor Rothschild, does not support any categories or principles of superiority and hierarchy. At the same time, identity and diversity are empirical facts that social institutions must contend with. A fatherless world is not a balkanized world, nor is it a color-blind or gender-neutral one.

IV. IN WHICH THE AUTHOR TIGHTENS SOME LOOSE ENDS AND LOOSENS SOME TIGHT ONES

I wrote the first draft of this review in early August. I received the edits after September 11, 2001. That day's events, in my mind, seemingly belie Professor Rothschild's claim that the twenty-first century, like the eighteenth, is filled with a "sense of an unbounded future." The annihilation of the World Trade Center and the attempted destruction of the Pentagon symbolize attacks on the foci of

63. RACE AND THE ENLIGHTENMENT, *supra* note 58, at 65.

Economic Sentiments: economics and politics. The surprise of the attack and its devastation illustrate the uncertainty inherent in an ordered world of commerce and politics as well as the violence engendered in reactions to Enlightenment thought and institutions. Recognizing this uncertainty perhaps is a curative to the various reactions to the tragedy of September 11, such as the supposed rationality of racial profiling or the emergence of more jingoistic military tactics.

One, now perhaps naive, notion informed my decision to review Professor Rothschild's book: the notion that ideas matter. The calculated violence of September 11 and the contemporary desire for pragmatism and practicality may make my notion misguided. But I finished Professor Rothschild's book recognizing that the balance between ideas and practice and between theory and fact is the hallmark of Smith and Condorcet's works, and perhaps the greatest contribution of the Enlightenment. Neither Smith nor Condorcet were naive believers in the power of reason or practitioners of a dismal science. They were sensitive to institutions and history and the context in which markets and commerce operated. It is clear from Professor Rothschild's book that their work is not wholly consonant with current conservative agenda of universal commerce and commodification. The more difficult question is whether Smith and Condorcet are relevant to liberal or leftist institutional building and legal reform. I have suggested some points of relevance. Future research, I hope, will expand on these points by following the lead of Professor Rothschild's insightful and stimulating book.